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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,

10 Plaintiff,

11 v.

12 Michael Leroy Witt,

13 Defendant.
14

No. CR-23-00389-001-TUC-JCH (EJM)

ORDER

15 On May 12, 2023, Defendant filed a "Motion for Bill of Particulars." Doc. 33. The
16 Motion was fully briefed. Docs. 34, 35. Before the Court is Magistrate Judge Markovich's
17 Report and Recommendation ("R&R"). Doc. 39. The R&R recommends that the Court
18 deny Defendant's Motion. Doc. 39 at 1. Defendant objected primarily by incorporating his
19 arguments raised before Judge Markovich, Doc. 41 at 2, and the Government responded
20 entirely by incorporating its arguments raised before Judge Markovich. *See* Doc. 42 (citing
21 Doc. 34).

22 **I. Legal Standards**

23 **a. R&R Review Standard**

24 A district court reviews objected-to portions of an R&R de novo. 28 U.S.C.
25 § 636(b)(1); *see also* Fed. R. Civ. P. 72(b); *United States v. Remsing*, 874 F.2d 614, 617
26 (9th Cir. 1989).

27 **b. Bill of Particulars**

28 The Court may, in its sound discretion, direct the Government to produce a bill of

1 particulars—a formal written statement providing details of a defendant's charges. *See Will*
 2 *v. United States*, 389 U.S. 90, 98–99 (1967); *Cook v. United States*, 354 F.2d 529, 531 (9th

3 Cir. 1965); Fed. R. Crim. P. 7(f). A bill of particulars may enable adequate trial preparation,

4 reduce surprise, and prevent double jeopardy from occurring. *United States v. Long*, 706

5 F.2d 1044, 1054 (9th Cir. 1983). But a defendant need only know the "theory of the

6 government's case," not "all the evidence the government intends to produce." *Cook*, 354

7 F.2d at 531.

8 **II. Analysis**

9 Defendant does not object to Judge Markovich's statement of facts, description of

10 Defendant's underlying Motion, or rule statement. *Compare* Doc. 39 at 1–4, *with* Doc. 41.

11 The Court can find no error in them and will adopt them in full.

12 Incorporating arguments raised before Judge Markovich, Defendant primarily

13 objects to the R&R's conclusion that "the defense has been provided with sufficient

14 information to adequately defend against the assault charge." Doc. 41 at 2 (citing Docs. 33,

15 35). More specifically, Defendant argues that "[c]ontrary to what the Magistrate Judge

16 suggests, it is not apparent what theory the government is pursuing." Doc. 41 at 3.

17 Defendant argues that the Government "has failed to identify what act caused the injuries

18 of each alleged victim(s), what bodily injury was sustained, or when the injury occurred."

19 *Id.* Defendant further argues that the "indictment equally fails to indicate how and whose

20 life the defendant allegedly endangered." *Id.*

21 The Court disagrees. As described in the Complaint, Indictment, and the R&R, the

22 Government's case is based on facts suggesting that Defendant tried to drive off with a

23 border patrol agent hanging onto him and with two illegal aliens concealed in his back seat.

24 *See* Doc. 1 at 1–2; Doc. 18 at 1–3; Doc. 39 at 1–2. As the R&R observed, Defendant's

25 questions have more to do with the sufficiency and weight of the evidence than the

26 Government's theory. *See* Doc. 39 at 4. For example, Defendant objects that Count One is

27 vague essentially because Defendant does not think it meets the definition of assault. *See*

28 Doc. 33 at 2; Doc. 35 at 2; Doc. 41 at 2–3. Likewise, for Counts 2–4 Defendant asks:

1 What "serious bodily injury" did [Defendant] cause? To what person
 2 specifically? What is the act [Defendant] is accused of doing that caused
 3 "serious bodily harm"[] [Counts 2–4] make[] no mention of any specific
 4 person.

5 *See* Doc. 33 at 2–3; Doc. 35 at 2–3. Counts Two through Four state that Defendant
 6 conspired to transport illegal aliens for financial gain, "during and in relation to which [he]
 7 caused serious bodily injury to or placed in jeopardy the life of any person, all in violation
 8 of Title 8, United States Code, [various subsections of] Sections 1324(a)(1)[(A) & (B)]."
 9 Doc. 18 at 2. Defendant argues that these charges are vague because "[the illegal aliens]
 10 testified that they were not hurt, and ... the agent sustained only 'bruising' and 'a cut.'" Doc.
 11 35 at 3. Defendant wonders, "Is the term 'any person' alluding to the aliens ...?" *Id.*

12 The Court is not similarly puzzled. The Government will prevail if it proves in
 13 relevant part that "any" person was injured or placed in jeopardy. The defense must
 14 therefore establish that "no" person was injured or placed in jeopardy. *Cf. United States v.*
 15 *Abascal*, 564 F.2d 821, 832 (9th Cir. 1977) (The government may charge in the conjunctive
 16 form that which the statutes denounce disjunctively, and evidence supporting any one of
 17 the charges will support a guilty verdict."); *see also, e.g., United States v. Ellis*, 121 F.
 18 Supp. 3d 927, 941 (N.D. Cal. 2015) ("[E]videntiary details sought by defendants, such as
 19 'the basic who, what, when, where and why of the crimes alleged,' fall within the scope of
 20 discovery and do not warrant a bill of particulars."). Defendant has benefited from
 21 substantial discovery, and objects to ambiguities that will not hamper his defense. This case
 22 is different from the case Defendant emphasized in his Motion. *See* Doc. 33 at 5 (citing
 23 *United States v. Alvarez*, No. 14-CR-00120 EMC (NC), 2014 WL 7240670, at *1 (N.D.
 24 Cal. Dec. 19, 2014)). Unlike in *Alvarez*, here there are not 17 defendants charged with 19
 25 counts of conspiracy where the defense needs critical details to understand which count
 26 (and associated meeting) relates to which defendant. Here it's just Defendant, charged with
 27 causing or risking injury in connection with a conspiracy to transport illegal aliens.

28 Thus, after de novo review the Court will overrule Defendant's objections, adopt the
 R&R in full, and exercise its discretion to deny Defendant's motion for a bill of particulars.

III. Order